Parisday @ Soso ak Michael Kuday (the administratrix of the estate of Calestine ak Parisday (deceased)) & Anor v Sari'ee bin Dogak & Anor

HIGH COURT (KUCHING) — CIVIL APPEAL NO KCH-12B-6/1 OF 2012
RHODZARIAH BUJANG J
30 AUGUST 2012

Civil Procedure — Appeal — Facts, finding of — Trial judge found that respondents were not liable for negligence — Whether trial judge erred — Whether appellate court should interfere

A motorcyclist and his pillion rider died in a road accident between the motorcyclist and a trailer attached to an empty prime mover. It was not disputed that the trailer was being driven along a straight road and was passing a junction where the motorcycle was at when the accident occurred. The administrators of the estates of both deceased persons ('the appellants') sued the trailer driver and the trailer's registered owner ('the respondents') for negligence. A motorist, who had been following the trailer from behind, gave a statement to the police that the motorcyclist had been riding at a fast speed and had rammed into the rear left side of the trailer. Relying on the sketch plan, the chemist report and the Puspakom report the SCJ concluded that the motorcycle's front tyre that was jutting out of the junction got hit by the trailer and was flung to the side of the road. It was thus the SCJ's finding that the respondent trailer driver had not encroached into the junction and caused the fatal collision. The SCJ thus held that the respondents were not liable for negligence. This was an appeal against that finding.

Held, dismissing the appeal with costs of RM3,000:

(1) The SCJ was entitled not to rely on the evidence of the eyewitness who had given evidence in favour of the motorcyclist. The eyewitness had given an unlikely explanation as to why he had not made a statement to the police officer, who was at the scene of the accident barely half an hour after the accident. The eyewitness had also failed to explain why he had not gone to the police station after that night to make a statement, especially when he claimed to be an acquaintance of the deceased motorcyclist's parent. This witness' long silence over the matter had compromised his credibility and the weight to be given to his evidence (see para 8).

(2) The fact that the motorist who made a police statement that the

motorcyclist was speeding and the lorry attendant were not called as witnesses did not mean that an adverse inference should be drawn against the respondents. In any case, the sketch plan and the chemist report supported the motorist eyewitness' version of the accident (see paras 9–10).

(3) The fact that the trailer driver had not stopped after the accident but had instead asked his attendant to dump the body on the road did not automatically make him a liar. In any case, the extensive damage to the front and right side of the motorcycle as listed in the Puspakom report further supported the respondent's version of the accident (see para 12).

[Bahasa Malaysia summary

Penunggang motosikal dan pemboncengnya meninggal dunia akibat kemalangan jalan raya di antara penunggang motosikal dengan treler yang bersambung ke penggerak utama yang kosong. Tidak dipertikaikan bahawa treler dipandu di jalan yang lurus dan sedang melintasi persimpangan di mana motosikal tersebut berada semasa kemalangan tersebut berlaku. Pentadbir-pentadbir estet kedua-dua si mati ('perayu-perayu') menyaman pemandu treler dan pemilik berdaftar treler ('responden-responden') untuk kecuaian. Pemandu motokar yang mengikut treler daripada belakang memberi penyataan kepada polis bahawa penunggang motosikal menunggang dengan laju dan merempuh ke bahagian kiri belakang treler tersebut. Bergantung atas pelan lakaran, laporan ahli kimia dan laporan Puspakom HMS memutuskan bahawa tayar depan motosikal yang terkeluar daripada persimpangan tersebut dilanggar oleh treler dan terjatuh ke bahagian tepi jalan. Ia adalah dapatan HMS bahawa responden pemandu treler tidak masuk ke persimpangan dan menyebabkan pelanggaran yang tidak dapat dielak tersebut. HMS oleh itu memutuskan bahawa responden-responden tidak bertanggungjawab untuk kecuaian. Ini adalah rayuan terhadap dapatan tersebut.

Diputuskan, menolak rayuan dengan kos RM3,000:

(1) HMS berhak untuk tidak bergantung atas keterangan saksi yang telah memberi keterangan memihak penunggang motosikal. Saksi tersebut mungkin tidak memberi penjelasan mengapa dia tidak membuat penyataan kepada pegawai polis, yang berada di tempat kemalangan setengah jam selepas kemalangan tersebut. Saksi tersebut juga gagal untuk menjelaskan mengapa dia tidak pergi ke stesyen polis selepas malam tersebut untuk membuat penyataan, terutamanya apabila dia mendakwa dia adalah kawan ibu bapa si mati penunggang motosikal. Sikap berdiam lama saksi ini terhadap perkara ini telah menjejaskan kredibiliti dia dan kepercayaan untuk diberikan kepada keterangannya (lihat perenggan 8).

(2) Fakta bahawa pemandu motokar yang membuat penyataan polis bahawa

penunggang motosikal menunggang dengan laju dan atendan lori tidak dipanggil sebagai saksi-saksi tidak bermaksud bahawa inferens bertentangan patut dibuat terhadap responden-responden. Walau bagaimanapun, pelan lakaran dan laporan ahli kimia menyokong versi saksi pemandu motokar mengenai kemalangan tersebut (lihat perenggan 9–10).

(3) Fakta bahawa pemandu treler tidak berhenti selepas kemalangan tetapi sebaliknya meminta atendan mencampakkan mayat atas jalan tidak secara automatik membuatkan dia seorang pembohong. Walau bagaimanapun, kerosakan besar kepada bahagian depan dan kanan motosikal seperti yang disenaraikan di dalam laporan Puspakom selanjutnya menyokong versi responden mengenai kemalangan tersebut (lihat perenggan 12).]

Notes

For cases on facts, finding of, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1169–1173.

Legislation referred to

Evidence Act 1950 s 114(g)

Sarbjit Singh (Joseph Kahell with him) (Khaira & Co) for the appellants.
Sunny Si (Si & Associates) for the respondents.

Rhodzariah Bujang J:

[1] In a horrific accident which happened late in the night of 1 August 2007 between a motorcyclist and his pillion rider and a trailer which was attached to an empty prime mover, the two on the motorcycle died. The undisputed evidence shows that following the collision the two deceased were flung onto the prime mover and one body felled off some distance from the place where the accident occurred whilst the second body was pushed off by the lorry attendant onto the road upon the trailer driver's instruction.

[2] The trailer driver and his attendant then drove straight to the police station as according to the trailer driver, he feared for their safety if he were to stop at the place of the incident.

[3] The learned sessions court judge found the trailer driver and the trailer's registered owner not liable for negligence and this is an appeal against his finding as such by the administratrix and administrator, respectively, of the estates of both deceased persons.

[4] The case for the appellants were fought in the trial court with the

A evidence of two material witnesses — PW1, a police officer who arrived at the scene of the accident soon after it and drew three sketch plans and PW2 a motorist, who was following the trailer from behind. Three other witnesses who testified were the parents of the deceased persons and the last, a loss adjuster who only interviewed the trailer driver and no other persons.

B

PLACE OF ACCIDENT

[5] It was not disputed that the trailer was driving along a straight road and was passing a junction where the motorcycle was at. According to the summary C of the evidence of learned sessions court judge, the trailer driver said that after he passed the junction he saw a motorcycle with a rider but he could not say if the rider was the deceased person. He did feel an impact at the rear of the vehicle, like hitting a pothole and was informed by his attendant that a motorcycle had hit the trailer and a body was entangled on it.

D

[6] The motorcycle was found by PW1 at the grass verge of the road inside the junction. He also drew a scratch mark which stretches from; almost the middle of the mouth of the junction, extending to the grass verge and ending E behind the motorcycle. But, he drew the point of impact as point 'X' which was way inside the junction (see the sketch plan marked exh P2(10)(a) appearing at p 290 of the appeal record). The other two sketch plans were only to show where the bodies were found. The first was on the road close to the right side of mouth of the junction and the other on the road side further away from it.

F

[7] He relied on the sketch plan, the chemist report and the Puspakom report and make his own conclusion as to how the accident could have occurred, inter alia, that the motorcycle's front tyre jutted out of the junction and got hit by the trailer, was flung and then skidded to the side of the road. The point of impact G according to him was on the main road. There was also no tyre marks to show that the trailer had encroached into the junction as alleged by the appellants, said the learned sessions court judge. He therefore rejected the evidence of PW2, the eye-witness for the appellants and noted that the said witness did not report what he saw to the police.

H

[8] I must say that I could not fault the learned sessions court judge for rejecting the evidence of that eye-witness because in his evidence he said that when the police officer, PW1, was at the scene barely half an hour after the accident, he was there but because of the situation then, with so many people I there, he did not speak to him. He had also said after the collision he followed the trailer and saw the first body on the road but had to leave urgently to meet a friend in Kuching but again did not deemed it fit to report that discovery to the PW1 whom he met at the scene. Even if one were to excuse such an unlikely explanation as that given by him, it still does not explain why he never went to

the police station after that night, especially when he claimed to be an acquaintance of one of the deceased's parent. Surely the natural reaction of such an acquaintance who saw an accident which claimed the life of that acquaintances offspring would be to come forward with his version of the accident especially when what he saw was in favour of the acquaintance. Thus, in my view, his long silence over the matter has compromised his credibility and the weight to be given to his evidence. The learned sessions court judge was therefore entitled not to rely on his version of how the accident happened.

THE OTHER EYE-WITNESS

[9] The investigation papers in this case was referred to a coroner, Puan Afidah bt Abdul Rahman and in it was mentioned an eye witness named Julim ak Nyogem whose statement was recorded by the police. He said that the motorcycle was riden at a fast speed and rammed into the rear left side of the trailer. The coroner accepted his statement and there was no inquest called to determine the cause of death. This witness did not give evidence at the trial. Neither did the lorry attendant. The appellant's counsel submitted that an adverse inference should be drawn against the respondents for failure to procure these witnesses. They further submitted that the learned trial judge seems to concur with the finding of the coroner and it was wrong for him to do so.

[10] On this issue, it must first be said that before adverse inference is drawn under s 114(g) of the Evidence Act 1950, there must be the withholding or suppression of evidence, not just failure to adduce the evidence. I do not see evidence of that being shown in this case. Further, I see no legal prohibition why the learned sessions court judge cannot consider the finding of the coroner in arriving at his decision. However, more importantly, I agree with the respondent's counsel and the learned sessions court judge that the sketch plan and the chemist report support the version of accident as testified by the said Julim ak Nyogem.

THE CHEMIST REPORT AND THE SKETCH PLAN

[11] The chemist report has a diagram which shows the positions of the vehicle at the point of impact and mentioned the presence of a foreign paint at the left rearside region of the trailer which indicates the point of impact. Since both the vehicles were moving, the force of the collision would probably, as agreed by the PW1 police officer, flung the bodies of the deceased on to the trailer and it would explained the motorcycle careening to the grass verge of the road, causing the long scratch mark on it as shown in the sketch plan. The scratch mark, I must again emphasised is at the outer part of the mouth of the junction. Had the trailer encroached into the mouth of the junction and the

point of impact is at point 'X' which is way inside of it and further if the motorcycle was stationary at that time, the probability of motorcycle making that scratch mark at the mouth of the junction and the bodies being flung onto the trailer is definitely much less. Stating the obvious, civil cases are decided on the balance of probability and the party whose case is more probable than the other would have to win.

[12] In saying this I do agree with the appellant's counsel that what the trailer driver did that night, not stopping after the accident and asking his attendant to dump the body on the road were not the action of an honourable man, whether or not the fear for his safety is justified. The fact that he did not behave in an honorable manner does not automatically make him a liar in court. The way the learned sessions court judge and I considered the documentary evidence have supported his version that he did not encroach into the junction and caused the fatal collision.

[13] As for the marking of the point of impact inside the junction by the police officer, it was done not based on concrete evidence but 'based on his experience' and that cannot override the probability of the respondent's case based on the documentary evidence.

[14] There is another point raised by the appellant's counsel and it is that if the accident happened as per the respondent's version of it, the motorcycle would have suffered extensive damage to its front.

[15] However, when I examined the damage as listed in the Puspakom report (exh P5 at p 308 of the appeal record), it was indeed indicative of a frontal collision as the front lamp has fallen off, the meter was broken, both the rear mirrors have fallen off, the handle bar was bent, the front foot rest was broken as was the bracket to the back foot rest, the exhaust was bent, both front lights were broken and finally, the back right signal light was also broken. The damages were to the front and the right side of the motorcycle and the damage to the right side is understandable as the motorcycle's final resting position was on its right side, (see photograph G at p 302 of the appeal record). The two photographs of the motorcycle at p 301 of the appeal record clearly show the extreme damage to the motorcycle to its front side as it looked horribly mangled at the front with no wheel at all, pointing to a probability that it hit the rear of the trailer at an angle as shown in the chemist report. It is significant to note that in the chemist report (at p 312 of the appeal record) it is noted that the front portion of the motorcycle 'was badly damaged', 'that the front wheel was dislocated' and 'the right side was abraded', again supporting the conclusion which I just reached above.

[16] I therefore concur with the finding of no liability against the

respondents as found by the learned sessions court judge and would have to dismiss this appeal with costs of RM3,000.

Appeal dismissed with costs of RM3,000.

Reported by Kohila Nesan